

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 PERSONAL AUDIO, LLC ) (

5 ) ( CIVIL DOCKET NO.

6 ) ( 2:13-CV-13-JRG-RSP

7 VS. ) ( MARSHALL, TEXAS

8 ) (

9 TOGI ENTERTAINMENT, INC. ) ( MAY 29, 2014

10 ) ( 1:30 P.M.

11 MOTION HEARING

12 BEFORE THE HONORABLE JUDGE ROY S. PAYNE

13 UNITED STATES MAGISTRATE JUDGE

14  
15 APPEARANCES:

16 FOR THE PLAINTIFF: (See sign-in sheets docketed in  
17 minutes of this hearing.)

18 FOR THE DEFENDANT: (See sign-in sheets docketed in  
19 minutes of this hearing.)

20 COURT REPORTER: Ms. Shelly Holmes, CSR-TCRR  
21 Official Reporter  
22 United States District Court  
23 Eastern District of Texas  
24 Marshall Division  
100 E. Houston Street  
Marshall, Texas 75670  
(903) 923-7464

25 (Proceedings recorded by mechanical stenography, transcript  
produced on a CAT system.)

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I N D E X

May 29, 2014

Page

Appearances

1

Hearing

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Court Reporter's Certificate

53

1 LAW CLERK: All rise.

2 THE COURT: Good afternoon. Please be seated.

3 For the record, we're here for the hearing on the  
4 motions to compel in the Personal Audio versus Togi  
5 Entertainment matter, which is 2:13-13 on our docket.

6 Would counsel state their appearances for the record?

7 MS. HENRY: Good morning, Your Honor -- good  
8 afternoon, Your Honor. Claire Henry on behalf of Plaintiff.  
9 Along with me today are Jeremy Pitcock and Papool Chaudhari.  
10 We're ready.

11 THE COURT: All right. Thank you, Ms. Henry.

12 MR. SMITH: Your Honor, Michael Smith for How Stuff  
13 Works. We also have Mr. Mark Reiter and Mr. Jason Lo, who will  
14 be presenting for us today. We're ready to proceed, Your  
15 Honor.

16 THE COURT: Thank you, Mr. Smith.

17 MS. AINSWORTH: Good afternoon, Your Honor. Jennifer  
18 Ainsworth and Sharon Davis for CBS Corporation, NBC Universal,  
19 and the FOX Defendants.

20 THE COURT: Thank you, Ms. Ainsworth.

21 MS. DAVIS: Good afternoon, Your Honor.

22 THE COURT: I guess let me start off by hearing from  
23 Plaintiff on their -- on the first motion. We can take up  
24 the -- the motion regarding How Stuff Works first.

25 MR. CHAUDHARI: Good afternoon, Your Honor.

1 THE COURT: Good afternoon, Mr. Chaudhari.

2 MR. CHAUDHARI: Just a housekeeping matter, Your  
3 Honor.

4 THE COURT: Yes.

5 MR. CHAUDHARI: Both of these motions are sealed --  
6 the briefs are sealed in its entirety, and we think that in  
7 compliance with the protective order, that the Defendants for  
8 the -- in the other -- in the other motion should be asked to  
9 leave the courtroom and vice versa.

10 THE COURT: Is there -- all right. Are you raising  
11 this out of concern for whether or not the Defendants'  
12 technology will be revealed from one to the other? In other  
13 words, is this an issue that's simply up to the Defendants  
14 or --

15 MR. CHAUDHARI: Yeah, I mean -- I'm -- I'm happy to  
16 defer to the Defendants on it, but we -- but we may have AEO  
17 documents and be discussing AEO matters.

18 THE COURT: Well, I guess I'll put it first to --  
19 Mr. Smith, to your side, is -- does -- since we're taking up  
20 your motion first or the motion regarding your client, do you  
21 want the counsel for the other Defendant to be out of the  
22 courtroom?

23 MR. SMITH: No, we don't, Your Honor. We're fine with  
24 them being here for this motion.

25 THE COURT: Okay. And, Ms. Ainsworth, Ms. Davis,

1 are -- what about y'all?

2 MS. AINSWORTH: That's fine with us, Your Honor.  
3 There's only attorneys here, no client representatives today.

4 THE COURT: Okay. Well, I appreciate you raising that  
5 issue, Mr. Chaudhari, but we'll -- we'll go ahead and proceed.

6 MR. CHAUDHARI: Thank you, Your Honor.

7 I think -- you know, before we get lost in the weeds  
8 of this -- of this motion, I think there's just one -- I think  
9 there's one basic fact that we should really call to the  
10 Court's attention, and that's that the technical 30 -- 30(b)(6)  
11 damages dep -- I'm sorry, the technical deposition for How  
12 Stuff Works, the 30(b)(6) dep -- 30(b)(6) deposition occurred  
13 on May 7th. It was scheduled for May 7th. Their damages  
14 deposition was scheduled for May 9th. And during the technical  
15 deposition on May 7th of Arensberg, it was clear to Plaintiff  
16 that he wasn't educated on the technical aspects of how audio  
17 podcasts were made available on the How Stuff Works website.

18 And at that time, at that deposition, Mr. Lo here  
19 made -- you know, put it on the record their -- their position  
20 that they've set forth in their briefing in this motion.  
21 And -- and I was there, and I put on the record that we were  
22 going to file a motion to compel on this issue. And the very  
23 next day, we get a document produced by How Stuff Works, which  
24 I'll put on the ELMO here for the Court's convenience. Here's  
25 the first page of it.

1 Perfect.

2 And -- and what this document is, as confirmed by How  
3 Stuff Works's damages witness on the -- on the very next day,  
4 on May 9th, are -- is a document here that reflects the number  
5 of downloads of the audio podcasts that are made available on  
6 the How Stuff Works website.

7 Further, prior to that, How Stuff Works has always  
8 produced damages documents related to audio. In fact, one that  
9 was presented to Mr. Emmer is right here. You'll see here it  
10 says, accused divisions, and one of them here is non-video  
11 display, which Mr. Emmer confirmed referred to audio podcasts.  
12 So I think before we get into all the -- you know, what I call  
13 the weeds on this, it should be made very clear that How Stuff  
14 Works has produced damages discovery on audio. Therefore, I  
15 mean, there's really no reason that they shouldn't have  
16 produced technical discovery, as well.

17 If we go back to January 2013, that's when -- when  
18 Personal Audio filed its complaint against How Stuff Works. In  
19 its complaint, it alleged claim -- it alleged that How Stuff  
20 Works infringes Claim 31. Claim 31 is an apparatus claim that  
21 goes to the dissemination of media content. Or I'll use the  
22 words of Defendants in their -- in a letter brief that they  
23 have submitted to the Court for a motion for summary judgment.  
24 And they've referred to the claim as claiming devices that  
25 distribute content to a user upon request.

1 Well, I mean, whether that's audio or video, it makes  
2 no difference. I mean, the claim at issue is an apparatus  
3 claim for this device that distributes this content.

4 Now, in July of 2013, the -- Personal Audio served  
5 infringement contentions against How Stuff Works, and in those  
6 infringement contentions, we specifically did say that we  
7 alleged that How Stuff Works infringes this apparatus claim.

8 Now, what we -- what we provided is we did provide  
9 examples of how the audio -- how video content was made  
10 available on the website. We did not provide an example of how  
11 audio content is made available on the website.

12 THE COURT: And why not?

13 MR. CHAUDHARI: We didn't think it's necessary. We  
14 don't even think that providing the example of video content  
15 was necessary.

16 THE COURT: Were you aware -- did you hold the belief  
17 at that time that they were infringing in the -- in connection  
18 with their audio podcasts?

19 MR. CHAUDHARI: Yes.

20 THE COURT: And is there any reason why that belief  
21 wasn't reflected in your contentions?

22 MR. CHAUDHARI: We didn't think that there was any  
23 need to reflect every single show or -- or podcast. I mean,  
24 let's --

25 THE COURT: Did you amend your contentions as to NBC

1 and CBS to include a contention regarding the audio podcasts?

2 MR. CHAUDHARI: We did, Your Honor.

3 THE COURT: Why did you do it in that -- with respect  
4 to that Defendant but not with respect to How Stuff Works?

5 MR. CHAUDHARI: Frankly, you know, in a typical -- in  
6 a typical patent case, and you've got apparatus claims, and --  
7 and let me rephrase that.

8 The accused -- although we -- although we have  
9 referred to video and audio content as accused products in the  
10 past, that is -- the only reason that we ever did that was to  
11 distinguish them from other aspects of these websites or  
12 webpages that have non -- that -- that have content that  
13 doesn't infringe the patent-in-suit. The patent is directed  
14 to -- to the apparatus claim.

15 Now, the -- now, our concern at the time that we  
16 created the infringement contentions was damages, right? In a  
17 typical case, if you don't list all of your products, you may  
18 not be able to get damages on those products. But we listed  
19 those products, the products are the apparatuses. They're not  
20 the shows. They're not the audio shows. They're not the video  
21 shows. But why did we do it as to NBC and CBS? It was just  
22 an -- an abundance of caution, Your Honor.

23 THE COURT: Why would you -- I guess I'm having a  
24 problem understanding you say that you -- the only reason you  
25 didn't do it as to How Stuff Works was because it was



1 unnecessary, but you did do it as to NBC and CBS. Why would  
2 you feel it was necessary there but not necessary for this  
3 Defendant?

4 MR. CHAUDHARI: So one -- again, that we believe that  
5 this was done in an abundance of caution related to -- to  
6 damages, which ended up being -- becoming a non-issue as to How  
7 Stuff Works because they've produced damages to -- discovery  
8 related to audio.

9 The other issue is that specifically as to How Stuff  
10 Works, the shows -- the video shows that are listed in the  
11 infringement contentions have a corresponding audio show.

12 Now, that is -- that's distinguished from NBC and CBS  
13 where the shows -- the audio shows that we added when we  
14 amended those contentions were not ones that were related to  
15 video programs that were previously set forth in the original  
16 infringement contentions.

17 THE COURT: Well, is it your position that How Stuff  
18 Works infringes in connection with their video programming just  
19 the same way as in their audio podcasts?

20 MR. CHAUDHARI: Well, it's -- we contend that it's the  
21 same apparatus. Now, you know, the -- the claim has different  
22 elements to what that apparatus has and what it -- and what it  
23 has to do, so there is a difference. The --

24 THE COURT: Then why don't you need to cover that in  
25 your infringement contentions?

1 MR. CHAUDHARI: Because the infringement contention --  
2 because the claim is an apparatus claim. The accused product  
3 is the -- is the apparatus. It's not -- it's not how it's --  
4 it's not -- it's not aspects of the How Stuff Works website,  
5 and that's why -- like I said, we take the position that we  
6 didn't even need to disclose video programs in the infringement  
7 contentions, although we did.

8 THE COURT: How is How Stuff Works to be on notice  
9 that you are claiming that they infringe in connection with  
10 their audio podcasts?

11 MR. CHAUDHARI: Because in their words, the claim  
12 is -- it's for devices that distribute content to a user upon  
13 request.

14 Now, I mean, the discovery order requires How Stuff  
15 Works and -- and all parties to produce all documents relevant  
16 to any claims and defenses. Our claim is that they infringe  
17 this claim that, as they put it, covers devices that distribute  
18 content to a user upon request.

19 I -- I -- you know, we think it's unreasonable to read  
20 our infringement contentions as a -- as a limitation on the --  
21 on the content itself because content isn't accused in this  
22 case.

23 THE COURT: And you're saying that the devices are the  
24 same? That everything that --

25 MR. CHAUDHARI: Same or similar. I mean, they've

1 said -- you know, if -- I'm going to just elaborate quickly on  
2 that. The -- the technical -- the technical exp -- the  
3 technical witness on the May 7th deposition testified as to  
4 using Akamai servers to provide video content, and in the  
5 opposition to the motion to compel, there's a declaration from  
6 Noel Brown who says that they use Akamai servers to provide  
7 the -- to put MP3 audio content on the How Stuff Works  
8 website.

9 THE COURT: Well, you've gotten the technical  
10 discovery as to the video?

11 MR. CHAUDHARI: That's correct.

12 THE COURT: And why -- if -- if that's the same as the  
13 audio, then why do you need it again?

14 MR. CHAUDHARI: Well, I -- I don't know that it's the  
15 same. I mean, I -- I mean --

16 THE COURT: Aren't you telling me that it's the same,  
17 and that's why your infringement contentions apply to both?

18 MR. CHAUDHARI: Well, I mean, I -- I don't know if  
19 it -- if -- I don't -- I don't know if it operates in exactly  
20 the same manner, or at least I didn't -- I didn't have any idea  
21 of that until -- until seeing the declarations that are in the  
22 opposition.

23 THE COURT: But you -- you are saying that you knew  
24 about the audio podcasts of How Stuff Works at the time you  
25 filed your infringement contentions in August?

1 MR. CHAUDHARI: Yes.

2 THE COURT: You simply did not make any reference to  
3 the audio at that time?

4 MR. CHAUDHARI: That's correct.

5 THE COURT: So if the Court concludes that your  
6 infringement contentions should have included that, there's no  
7 excuse for not having included it? It was available to you, it  
8 was known to you?

9 MR. CHAUDHARI: Well, we still maintain that we  
10 didn't have -- you know, if we had access to the servers --

11 THE COURT: I understand.

12 MR. CHAUDHARI: -- at the time -- at the time that we  
13 served our infringement contentions, that'd -- that'd be a  
14 whole different situation.

15 THE COURT: But you're not contending that there was  
16 anything that you didn't know at that time about audio podcasts  
17 that prevented you from including that in your infringement  
18 contentions?

19 MR. CHAUDHARI: That's correct.

20 THE COURT: Okay. And tell -- give me the answer  
21 again just so I can understand clearly. You -- what is it that  
22 you contend put How Stuff Works on notice from your  
23 infringement contentions that the audio podcasts recovered -- I  
24 mean, and I guess I'm thinking about what the Defendants cited  
25 on the first page of their response brief.

1 MR. CHAUDHARI: Sure.

2 THE COURT: Document 161 where they quote from your  
3 infringement contentions as saying only those shows currently  
4 available at the website are known to infringe at this time.

5 MR. CHAUDHARI: Yeah, that's a reference to shows that  
6 either were made -- either -- either were made available  
7 previously but aren't anymore or may be -- may be available in  
8 the future.

9 Looking at the infringement contentions, and that  
10 would be Plaintiff's Exhibit 3, and I'm on Page 2, and it's  
11 Section 1, Subsection B, and we state in our infringement  
12 contentions Claims 31 and 32 are infringed by an apparatus as  
13 described in the PR 3-1(c) chart below. And in that chart --  
14 that was on -- I'm sorry, that was on Page 2. On Page 5, we  
15 see the element that the -- the -- our contention corresponds  
16 to that -- that apparatus preamble, and we say, for example,  
17 the webpages and associated data storage servers and  
18 communication interfaces at howstuffworks.com are used to  
19 disseminate a series of episodes represented by various  
20 media files via communication interfaces connected to the  
21 Internet.

22 THE COURT: And is there anything that makes reference  
23 to the -- to the audio podcasts as opposed to the video?

24 MR. CHAUDHARI: No, there is not.

25 THE COURT: And in the -- in the Defendants' brief,

1 they cite to a statement -- this is on the same page as you  
2 were referring to before -- that the currently available  
3 listing of series episodes which infringe can be found at --  
4 and then it lists a portion of their website that deals with  
5 videos. That would appear to me to be stating that the -- that  
6 the shows that you felt were infringing were videos.

7 MR. CHAUDHARI: But -- but, again, shows only go to  
8 damages. I mean -- I mean, a show is not an accused product  
9 here because we're talking about a server side apparatus claim  
10 with dissemination of media content. I think that's the --  
11 that's the key here. The key confusion here is that we're --  
12 is that we are looking at videos and shows and -- and referring  
13 to them as accused products when the claim doesn't claim the  
14 shows. The claim claims a server apparatus that disseminates  
15 those shows. The shows go to damages only.

16 THE COURT: Okay. Go ahead. I think I interrupted  
17 your argument. So you can -- if there's other argument you  
18 want to provide on your motion, please go ahead.

19 MR. CHAUDHARI: Yes, Your Honor.

20 So just going forward in time after the service of the  
21 infringement contentions, we received How Stuff Works's Patent  
22 Local Rule 3-4 production, albeit a month late, but we did  
23 receive it. And the documentation there only related to video,  
24 but the discovery period in this case as to How Stuff Works  
25 opened in August and -- and closed on May 12th. Yet other than

1 their 3-4 production, we received no other documents until the  
2 last day for substantial completion of document production.  
3 Had we received -- had we received a rolling production  
4 throughout the discovery period, we would have been able to  
5 readily determine that -- that we weren't going to get anything  
6 technical wise from them on audio and could have raised the  
7 issue months ago.

8 But even then, we still raised the issue -- as soon as  
9 we did get that production on -- on March 31st, we recognized  
10 the issue, we raised it, we went into the meet and confer, and  
11 our position is that we -- we resolved the issue, that we --  
12 that they told us they were going to give us technical  
13 discovery on audio podcasts. And I understand that -- that  
14 that's not their position here today. But there's really no  
15 need for the Court to get involved in a he-said/she-said  
16 here.

17 But I think that the key takeaway is that we had -- we  
18 had teed up a motion -- a meet and confer, we were on the verge  
19 of filing a motion to compel. Had Defendant told us that they  
20 weren't producing technical discovery on audio podcasts, we  
21 would have filed our motion the next day.

22 THE COURT: Which would have been when?

23 MR. CHAUDHARI: So the meet and confer occurred on  
24 April the 11th. That was a Friday, so we would have filed our  
25 motion on April 14th.

1 THE COURT: Okay. About four weeks before it was  
2 filed?

3 MR. CHAUDHARI: That's correct, Your Honor.

4 THE COURT: Okay.

5 MR. CHAUDHARI: So -- and, you know, all this goes to  
6 this notion that we weren't diligent in bringing this issue to  
7 the Court. Again, if -- if -- if we had gotten the document  
8 production in the course of discovery, as we should have, we  
9 would have been able to tee this up months ago. Even -- even  
10 after receiving the document production on March 31st, we were  
11 ready to -- to file a motion on April 14th, but we -- but we  
12 had an in-person meet and confer and talked with them, and we  
13 left with the understanding that they were going to give us  
14 technical discovery on audio. After all, it's undisputed that  
15 the -- that the -- it's undisputed that they've produced  
16 damages discovery on audio, and then reiterated that at the  
17 meet and confer, as well.

18 THE COURT: And is there anything in writing on that  
19 or are we just dealing with your impressions versus theirs from  
20 the discussions?

21 MR. CHAUDHARI: Yeah, I believe it is our impressions  
22 versus theirs, which is why I have been saying, he-said,  
23 she-said. I don't think we have a -- we don't have a writing  
24 that memorializes the -- the minutes of the meet and confer.

25 THE COURT: All right.



1 MR. CHAUDHARI: And if I can just close this out.

2 THE COURT: Uh-huh.

3 MR. CHAUDHARI: You know, in -- in the opposition, we  
4 get these -- of Defendants provided detailed declarations from  
5 Mr. Arensberg, their technical 30(b)(6) witness, and also Noel  
6 Brown, and they go into really in depth discussion as to how  
7 audio content is provided. And this was done on May 22nd. And  
8 the Arensberg deposition took place on May 7th.

9 Now, even -- even if you accept their position that  
10 there's some -- even if you accept that there's any merit to  
11 Defendants' argument regarding audio, I mean, really all they  
12 had to do here was provide some of this discovery back then,  
13 couple weeks ago, instead of waiting until this motion was  
14 filed and then going into all this detail in the opposition.

15 I mean, after all, what they could have done is  
16 produce this stuff and -- and held a battle on the relevance at  
17 a later time such as a motion in limine or motion to strike  
18 portions of an expert report, but instead, because they've  
19 taken this route, you know, it's -- it's really forced us to be  
20 here today in a -- in what's a -- in -- in a disfavorable  
21 motion to compel, because we know the Court doesn't favor  
22 motions to compel.

23 I say that because I think our -- our central point is  
24 that we're here because -- we're here because there's obviously  
25 a -- a misunderstanding between the parties as to what's

1 actually infringing in this case.

2 Two, the Defendant, you know, was not diligent in  
3 producing documents. Had they been, we could have resolved  
4 this issue months ago.

5 And, three, instead of waiting until an opposition on  
6 a motion to compel, they could have just given us this  
7 discovery and fought over it later.

8 THE COURT: Are you suggesting that you now have the  
9 technical discovery that you were seeking?

10 MR. CHAUDHARI: I'm suggesting that the declarations  
11 are a component of it.

12 THE COURT: Okay. But they're not -- they don't  
13 satisfy your -- what you think you need?

14 MR. CHAUDHARI: That's correct.

15 THE COURT: Okay. All right. Thank you,  
16 Mr. Chaudhari.

17 MR. LO: Good afternoon, Your Honor. Jason Lo for How  
18 Stuff Works.

19 I want to start with the last point, Your Honor, was  
20 asking about which was the diligence that the Plaintiff engaged  
21 in in raising up this issue. And throughout the papers,  
22 Plaintiff has said we only made one production, and we made our  
23 3-4 production late. That is factually incorrect. As we  
24 raised in our brief and as we noted -- and it's in Exhibit 6,  
25 which is -- which are our invalidity contentions -- we told the

1 Plaintiff on October 10th, the day we were supposed to, that we  
2 had gathered source code and that it was available for  
3 inspection. That is not in dispute.

4 And with the Court's permission, I want to hand up  
5 another document because usually in these cases when we tell  
6 the Plaintiff that we've got source code for inspection, they  
7 come right away and they say, you know, we want to schedule a  
8 time, and we want to look at your source code.

9 We actually never heard back from the Plaintiff, and  
10 so after a series of correspondence -- and this is what I want  
11 to hand up to the Court, if I may -- on October 30th, my  
12 colleague sent to the Plaintiff a letter saying, we said in our  
13 invalidity contentions, we have source code available for  
14 inspection. Please let us know when you want to come to look  
15 at it.

16 And so with the Court's permission, I will hand this  
17 up.

18 THE COURT: All right.

19 MR. LO: We got no response on that letter, no request  
20 to inspect the source code. And, in fact, the source code  
21 inspection never happened until May of this year, four days  
22 before they filed this motion. So that source code has been  
23 sitting around since October of 2013. We wrote a follow-up  
24 letter inviting them to come to inspect it. They never did so.  
25 And had they done so, they probably would have been on notice

1 that this was an issue, and they would have raised this issue  
2 earlier.

3 In their briefs, they also say we did our 3-4  
4 production late, and they make a reference to this November  
5 19th production. That is inaccurate. The November 19th  
6 production was something that was in addition to our 3-4  
7 production. Our 3-4 production was always the source code that  
8 was sitting there available for inspection. And then in  
9 November, we produced approximately six or 7,000 more pages of  
10 documents. In both sets of documents, had they bothered to  
11 look at them, they would have seen only video materials on the  
12 technical side. They would not have seen anything on audio.

13 They put --

14 THE COURT: Mr. Lo, one thing, do you disagree with  
15 their statement that you made damages disclosures regarding  
16 audio?

17 MR. LO: Yes, in the way it is framed in that sense,  
18 Your Honor. We provided -- and -- and this is a good example  
19 of the document that is on the -- on the projector right now.  
20 The way the company works is it -- it provides company wide pro  
21 forma statements, and How Stuff Works has a lot of things that  
22 are not relevant in this case. And so let's put aside audio  
23 for a second.

24 One of the things that the company puts on the How  
25 Stuff Works website are just articles that you can go on and

1 read. There's no audio content. There's no video content.  
2 Even the advertising revenue from those are included just in  
3 the ordinary course of business in our normal financial  
4 statements. And so the reason we provided not only the audio  
5 income data but also income data from, for example, non-video,  
6 from Google ads and things like that was because our damages  
7 expert ultimately would have needed a way to back out of that  
8 information. And as Your Honor knows, if the company keeps a  
9 document in its ordinary course of business and they give it to  
10 me to produce to the other side, I can't just take a black  
11 marker and say, you know, I don't think audio is in the case,  
12 I'm going to redact this. I'm not going to give it to you.

13 We gave them the documents as they are kept -- the  
14 numbers as they are kept by the company, and then we also tried  
15 to gather additional audio stuff and additional Google stuff,  
16 additional non-display stuff so that ultimately our expert  
17 would have a basis to say here are the overall numbers and  
18 here's how I'm backing it out so that I can figure out what  
19 portion is attributable to video.

20 THE COURT: All right. And you mentioned that if --  
21 if the Plaintiff had examined your source code earlier on, they  
22 would have been aware of this -- of this issue.

23 MR. LO: Yes.

24 THE COURT: Tell me about that. How would they have  
25 been aware?

1           MR. LO: Because the video -- and we -- we put this in  
2 the declaration. So, for example, one major difference -- and  
3 this part is publicly accessible. The videos are served using  
4 a totally different computer language, HTML, and it's the  
5 language that we all -- we don't see, but we interact with when  
6 we browse CNN.com or something like that. So when they looked  
7 at the source code, they would know that it's all the HTML  
8 stuff is in there. All of the audio that they pointed to is in  
9 a different language and interacts with a totally different  
10 kind of server. And, in fact, if Your Honor just used a web  
11 browser to go to one of these RSS XML pages, unless somebody  
12 had previously installed an additional software on top of it,  
13 that browser wouldn't be able to read that. So if you look at  
14 the source code and you simply look at -- at a very high level,  
15 what language is at issue, you would know.

16           There -- there's obviously better ways to know. And  
17 once you dig into it, you would also know that the content  
18 there is different, but just that they -- even if one is not a  
19 computer science expert, just looking at the different  
20 programming languages, you would know that there are no XML  
21 or -- or RSS materials in there.

22           THE COURT: All right.

23           MR. LO: The -- I won't belabor the point in terms of  
24 the notice as -- as Personal Audio concedes, they did not  
25 mention anything about the audio podcasts. And as counsel

1 concedes, there are differences between the audio and the  
2 video. They've now seen our declarations. They do not contend  
3 right now that they are done on the -- that they distributed in  
4 the same way because there are differences in terms of  
5 machinery. There are differences in terms of the personnel who  
6 do the video versus audio. There are differences in terms of  
7 the work flow that happens from beginning to end. All of those  
8 differences are laid out, and they don't really go through --  
9 and they should have done this in their opening brief on an  
10 element-by-element basis, tell the Court how they are  
11 reasonably similar.

12 Under Honeywell, that's what you've got to do when  
13 you're coding them to do so. And actually I should pause  
14 there.

15 As the Court started the conversation with  
16 Mr. Chaudhari, you don't even get to the reasonably similar  
17 analysis because there's no dispute that these audio pages were  
18 available at the time they did the contentions. Personal Audio  
19 has now said they were aware of them. They thought they  
20 infringed. And under the local rules and under Honeywell and  
21 Orion, when something is publicly available, you have to put  
22 those in your contentions. There's simply no excuse.

23 And it's telling that throughout their briefing, they  
24 refer to these as their preliminary infringement contentions.  
25 Well, that preliminary portion went out the door about six or

1 seven years ago, and the rules have changed, and those are not  
2 preliminary contentions. Those are contentions which under  
3 AEG, the Plaintiff has to exercise due diligence by looking at  
4 all publicly available information in order to -- in order to  
5 form their contentions, and they've not done that. They  
6 concede that. And that in itself ends the inquiry. You never  
7 even get to the reasonable similarity, nor -- nor do you get to  
8 the -- nor do you get to the diligence analysis.

9           The last thing I want to point out in terms of the  
10 differences -- and this is -- again, we can tell just by  
11 looking at the infringement contentions that they amended for  
12 CBS and for NBC. The Court has already pointed out that they  
13 put in different claim charts for the audio versus video. So  
14 even under their own analysis, their -- they didn't just say,  
15 everything infringes for the same reason. They did a separate  
16 claim chart when they did their contentions for audio and they  
17 amended it. That's Point No. 1.

18           Point No. 2 is if the Court takes a look at their  
19 contentions for video versus audio, the Court will notice that  
20 there are different claims asserted between the two sections.  
21 So, for example, in the video, they assert claims -- additional  
22 Claims 33 and 34, and those claims are not asserted when it  
23 comes to what they call the podcasting video, which is, I  
24 think, their shorthand for audio media. I'm not close enough  
25 with the -- how the things work behind -- behind the scene for



1 CBS or NBC to know exactly why. But just on the face of these  
2 contentions, that is another indicia that there is a  
3 substantial difference such that they chose not to assert two  
4 out of the four claims when it came to the audio.

5 THE COURT: All right.

6 MR. LO: So unless the Court has any additional  
7 questions, I'm prepared to rest.

8 THE COURT: I don't think so, Mr. Lo. Thank you.

9 MR. LO: Thank you.

10 THE COURT: Mr. Chaudhari, if you want to respond?

11 MR. CHAUDHARI: I'll keep this brief.

12 I led off our discussion here today discussing this  
13 document that was produced on the day between the technical  
14 30(b)(6) witness and the damages 30(b)(6) witness for How Stuff  
15 Works. The day after Mr. Lo went on the record on -- on his  
16 position and -- and also the day after I -- I went on the  
17 record and said we're going to file this motion.

18 Now, as we discussed earlier, this is a document that  
19 shows the number of downloads of audio podcasts broken out by  
20 podcast in the relevant -- in the relevant infringing time  
21 period.

22 Now, nowhere in the brief or -- or in Defendants'  
23 argument here today did they address this document. They don't  
24 address this document because this document is a concession  
25 from Defendant that audio belongs in this case, the day

1 after -- the day after they said the technical documents on  
2 audio aren't in this case. There's no technical -- you know,  
3 the day after they said that audio is not in this case. The  
4 day after I said, I'm going to -- that we're going to file a  
5 motion to compel to get audio discovery, they give us a  
6 document that -- that sets forth the number of downloads of  
7 audio podcasts on the How Stuff Works website.

8 THE COURT: Well --

9 MR. CHAUDHARI: There's no reason to produce that  
10 unless you concede that audio is a part of this case.

11 THE COURT: Mr. Chaudhari, Mr. Lo indicated that they  
12 produced damages discovery globally and then separately for  
13 audio and other non-video damages elements so that their expert  
14 could isolate the revenue relating to video alone. Is -- why  
15 would this not be consistent with that?

16 MR. CHAUDHARI: What I'm suggesting is that this  
17 having been produced on May 8th, the day after Mr. Lo went on  
18 the record saying audio is not in this case, the day after I  
19 said that we're going to file a motion to compel on audio, the  
20 day after that, they produced this document. That only goes to  
21 audio and only goes to downloads. They didn't produce this  
22 back on March 31 on their -- on the deadline for substantial  
23 completion or -- or at any other time in the -- in the relevant  
24 discovery period. They produced it the day after they said  
25 that audio is not in the case and the day after I said I was

1 going to file a motion to compel.

2 THE COURT: Okay.

3 MR. CHAUDHARI: As to the -- and I just wanted to --  
4 just a housekeeping point. On the -- on this issue about the  
5 3-4 production, we don't dispute that they said in their  
6 invalidity contentions that they were making source code  
7 available, but our understanding is that the 6,000 pages that  
8 we did receive in November of 2013 was a part of their 3-4  
9 production. And although we don't have the correspondence here  
10 before you today, we -- we -- we have always maintained that  
11 position.

12 THE COURT: What do you say in response to what Mr. Lo  
13 said about your CBS-NBC amended contentions where when you  
14 included audio, you provided separate charts and also relied on  
15 different claims?

16 MR. CHAUDHARI: That's right. Well, as to video as to  
17 NBC, CBS, and FOX, we do assert Claims 31, 32, 33, and 34. As  
18 to How Stuff Works in its entirety, we've only asserted --  
19 we've only asserted Claims 31 and 32.

20 THE COURT: So you're saying that if you were to amend  
21 with respect to audio regarding How Stuff Works, you would not  
22 do what you did with CBS and NBC?

23 MR. CHAUDHARI: We would not be adding Claims 33 and  
24 34.

25 THE COURT: All right. And would you rely upon any

1 different element-by-element analysis of the infringement  
2 concerning audio, as opposed to that which you've done  
3 regarding video for How Stuff Works?

4 MR. CHAUDHARI: We would -- we would point to -- we  
5 would point to what we assert as the compilation file, which  
6 is a -- it's -- as Mr. Lo says, it's -- I believe it's an XML  
7 file versus an HTML file, but it's also available on the How  
8 Stuff Works website. But, yeah, we would -- it would be  
9 essentially the same, except for pointing to these different  
10 webpages that are -- that are -- that are on the same site.

11 THE COURT: Okay. Thank you, Mr. Chaudhari.

12 I'd like to move to the other motion at this time.

13 Mr. Pitcock.

14 MR. PITCOCK: Yes, Your Honor. Good afternoon.

15 I -- there's a fundamental difference in the motion to  
16 compel against the network Defendants in that the main part of  
17 the dispute, at least on the technical side, is whether or not  
18 we were entitled to discovery on what are known as native  
19 mobile applications.

20 Unlike websites, which send an HTML file publicly to  
21 the browser and which you can analyze, native applications are  
22 written in machine code, and it is impossible to tell how they  
23 work absent discovery. So there -- there was no way at the  
24 time we filed our preliminary infringement contentions that we  
25 could have accused these products, the native mobile apps, of

1 infringement.

2           So what we did in our -- in our local rules is we  
3 tried to be as broad as possible in our -- in our infringement  
4 contentions, and particularly at 3-1(a), this is an exhibit --  
5 Exhibit 1 to our opening brief. On all of these, we say  
6 Personal Audio presently contends that Defendant infringes  
7 asserted Claims 31 through 34 directly by video media  
8 disseminated by the network Defendant. Further, to the extent  
9 that discovery shows that Defendant utilizes third-party  
10 computers to host the accused instrumentality, including at  
11 least the accused websites, such hosting would necessarily be  
12 at the direction and control of the Defendants.

13           So we always contemplated that there may be other  
14 websites that we were unaware of that were controlled by the  
15 Defendants, and we always contended that it was possible that  
16 they were using the same apparatus to infringe in a different  
17 way. But there was no way at the time we filed our  
18 infringement contentions or really there's no way without  
19 discovery that we could ever have in good faith said, yes, they  
20 have a compilation file, here's what it is, and it comes  
21 over -- comes over the -- the wire in response to a client  
22 device request. So that's the first point.

23           The second point is, you know, that there -- there's  
24 some discussion about, you know, whether we should have  
25 realized, based on their source code production, you know, what

1 they were and were not putting into the case. With respect to  
2 the network Defendants, they -- you know, we were hoping to  
3 focus our technical expert -- I mean, there are millions of  
4 lines of code to potentially analyze. It makes no sense to  
5 send an expert, you know, across the country to go look at a  
6 computer for days on end without some of the supporting  
7 technical documentation that we only received in part on March  
8 30th. There was no reason -- and when we did go to inspect the  
9 network Defendants' source code, they hadn't even produced all  
10 the source code relevant to the accused websites. In fact,  
11 they had -- despite their description of them, had not produced  
12 source code for any of the server side stuff, which we asked  
13 for and we had to have our expert go back and inspect again so  
14 that we could, you know, look at the right code for the various  
15 websites.

16           So, you know, Ms. -- I shouldn't personalize it, but  
17 the Defendants in their opposition, you know, they point to --  
18 they point to, you know, an article about the Defendants'  
19 native mobile apps. There's nothing in this article that  
20 indicates whether or not, you know, particular compilation  
21 files relating to episodes are sent to the requesting client  
22 device. There's no way to know that information absent  
23 discovery. When they failed to produce much in the way of  
24 documentation on March 30th, we sent a letter. Our request --  
25 we requested specific categories of documents which was set

1    forth in the reply brief. We specifically asked for, you know,  
2    documents that would be broad enough to cover any request for  
3    media disseminated over the Internet in a few different  
4    categories. And then when we had our meet and confer, they at  
5    no time said, okay, well, we're only going to give you this,  
6    but we're not going to give you anything else, or we would have  
7    known to bring our motion to compel at that time. We were just  
8    left in the position of -- they didn't even give us deadlines  
9    for their production. As we received documents, it became more  
10   and more clear.

11            And then, finally, at the technical depositions of the  
12   witnesses, which occurred mostly in the week right before the  
13   end of fact discovery because we weren't able to take them any  
14   earlier from lack of documentation, at that time, it -- that's  
15   when they said, okay, well, even though you asked for a  
16   30(b)(6) topic on native mobile apps and how they work, we're  
17   not going to -- you know, we're just not going to produce a  
18   witness on that topic.

19            THE COURT: All right. Thank you, Mr. Pitcock.

20            MR. PITCOCK: Oh, I'm sorry -- I'm sorry, Your Honor,  
21   there -- there is a second part of the brief which was on  
22   advertising. I -- I apologize.

23            And so looking at their reply brief, there's -- there  
24   was also advertising information. If you look at that same  
25   correspondence, we asked for a lot of information related to

1 advertising, and that was also not produced, although at the  
2 meet and confer, it was our understanding that they were going  
3 to produce those materials. And, again, it wasn't until the  
4 late depositions that it became apparent that they had not  
5 produced all the relevant documentation.

6 THE COURT: Thank you.

7 MS. DAVIS: Good afternoon, Your Honor.

8 THE COURT: Good afternoon, Ms. Davis.

9 MS. DAVIS: Let me start, I think, with the issue of  
10 the Plaintiff's disclosures in their infringement contentions.

11 As is the case with respect to the argument that you  
12 heard earlier, there's nothing in Plaintiff's infringement  
13 contentions that makes reference to native mobile apps. And  
14 you didn't hear -- Mr. Pitcock indicated that -- that in order  
15 to know whether or not the native mobile apps infringe, that  
16 somehow his contention is that he needed discovery to know  
17 that. But at no point either in the infringement contentions  
18 or during the entire factual discovery period where we were  
19 discussing documents, at no point did any of the counsel for  
20 Personal Audio ever raise the issue of native mobile  
21 applications being an accused product in this case.

22 At no point -- and we went through this in detail in  
23 the briefing, Your Honor. At no point -- first of all, as I  
24 said in the infringement contentions -- and if you look at Page  
25 3, for example, of the FOX infringement contentions, which is,



1 I think, what Mr. Pitcock pointed to, it's very clear it's  
2 referring to websites, explicitly, multiple times. Only those  
3 shows at websites believed to be upon information and belief  
4 under the direction and -- and control of FOX are listed below.  
5 However, other websites under control of the Defendants may be  
6 shows through discovery to infringe.

7           The only way you can understand these infringement  
8 contentions is that they were accusing the FOX -- in this case,  
9 FOX.com website and these servers related to the delivery of  
10 that website as being the infringing apparatus. That's what  
11 they said repeatedly in their infringement contentions and as  
12 we'll look at -- at the correspondence that was relating to  
13 fact discovery here.

14           We also pointed out that in their -- in their list of  
15 accused products, they refer to the example compilation HTML  
16 file that they're identifying. And as Mr. Pitcock himself  
17 admits, native mobile apps don't -- don't have HTML files that  
18 would fall and be this type of file.

19           When we get to the podcasts, they identified the XML  
20 files that are related to the delivery of those files as being  
21 the alleged infringed compilation file. There's no way that we  
22 could take from that an understanding that they were also  
23 accusing a totally separate type of technology that is in a  
24 different computer language that is downloaded to a device  
25 rather than being a system that uses a browser that is --

1 uses -- just uses a different player. We're talking about  
2 totally separate technologies here that they're now seeking to  
3 add to the case this entirely new technology.

4           And you already heard from Mr. Pitcock that he can't  
5 even -- even now say whether or not the native mobile apps  
6 infringe or don't infringe, which shows you that it's not just  
7 a matter of looking at a few servers. There is different  
8 technology, and the claims require the use of a compilation  
9 file. That compilation file is a file that has to get sent to  
10 the user's device. It has certain characteristics that are  
11 required by the claim. That has nothing to do with what type  
12 of server you're using.

13           That has to do with a mechanism by which the video is  
14 delivered on that particular kind of system, and that's  
15 entirely different for the apps as -- than it would be for the  
16 websites.

17           And really, what they're asking for -- I mean, I think  
18 would require -- it would require us to revisit technical  
19 documents. It would require new source code, new witnesses,  
20 and presumably they would want new expert reports at this stage  
21 of the game.

22           THE COURT: Ms. Davis, tell me, do you contend that  
23 anything that occurred during the discovery would have put them  
24 on notice that you are taking the position that native mobile  
25 apps were not accused here?

1 MS. DAVIS: The first time, Your Honor, that -- that  
2 the issue of native mobile apps was ever raised by Plaintiff  
3 was in their 30(b)(6) notice, and we did respond to their  
4 30(b)(6) notice by objecting on the grounds that native mobile  
5 apps had not been identified in the preliminary infringement  
6 contentions and that we would provide witnesses with respect to  
7 products that were identified in the preliminary infringement  
8 contentions.

9 If you look at the correspondence, Your Honor, in  
10 fact -- and -- and there's been a lot of discussion about the  
11 meet and confer. Let me be clear because I was in the meet and  
12 confer. We did it right here at this table. At no point  
13 during the meet and confer did Personal Audio ever say, we  
14 would like discovery about mobile apps. At no point were those  
15 words used. They're not in the letter. They're not in my  
16 responsive letter. And, in fact, you can tell from my  
17 responsive letter, which is at -- at Exhibit 9, you can tell  
18 that what we were talking about, that we did not include mobile  
19 apps.

20 In fact, as I -- if you look at my letter at Page 3,  
21 this was right before the meet and confer, so this was the --  
22 they had sent a letter with a list of requests. And we were  
23 providing a detailed response pursuant to Paragraph 9 of the  
24 discovery order. And what we said is with respect to technical  
25 documents, as we discussed in our telephone conversation,

1 because Plaintiff's counsel and I had a conversation about  
2 where we were on the document issues in advance of this letter  
3 and the meet and confer. I said, we remain unclear as to what  
4 kinds of documentation Personal Audio lacks that would be  
5 relevant to the claims or defenses in this case. We felt like  
6 at this point and -- and then we discussed it further in the  
7 meet and confer, we felt like we had already produced technical  
8 documents. We were asking, you know, hey, what is it that  
9 you -- that you think you don't have? And they had made a  
10 distinction between design and operation. We were asking about  
11 that. And then there were specific topics that we responded to  
12 as to the status of those.

13           It's telling -- a couple of things, Your Honor. With  
14 respect to one of the categories that Plaintiffs cite at the  
15 beginning of their reply brief, and they say, oh, we should  
16 have realized from looking at those categories that they meant  
17 to include mobile apps. Well, in my letter with respect to  
18 Category G, which is one of those topics, I said, we have  
19 produced documents showing this information. If there is  
20 additional material that you want and have not received, please  
21 let us know. Okay? So we were saying, we think we've produced  
22 everything on this topic. They didn't come back to us and say,  
23 oh, yes, but you haven't produced that stuff on mobile apps to  
24 us. They didn't come back and say that.

25           When we went to the meet and confer, there were

1 specific topics that we talked about. None of them involved  
2 anything to do with mobile apps. And we resolved all of the  
3 outstanding issues by agreeing what we were and were not going  
4 to produce. It was mostly honestly in the damages area. On  
5 the technical side, we had offered source code for  
6 production -- for inspection, and we had produced a lot of  
7 documents.

8 I also want to point out with respect to the  
9 correspondence that in the reply brief, Plaintiff suggests that  
10 we should have realized that they were including mobile apps  
11 because there were some categories that they -- the ones they  
12 list in their brief that they say are broader, and then there  
13 were other categories that were limited to the accused website.

14 Two points on that, Your Honor. First is in my letter  
15 of April 17th, Exhibit 9, on Page 4, I actually specifically  
16 add -- address something related to that issue. When we got to  
17 those -- those last K through R topics, I said, in our phone  
18 conference, you indicated that these requests were duplicative  
19 of A through J, because that was the conversation we had. They  
20 sort of had a very long list. It was A through R of technical  
21 documents that they were asking about. None of those, of  
22 course, included the words "app," "mobile app," "native mobile  
23 app." That was not in there.

24 But they had this A through R list, and so when we  
25 were going through them, it kind of got -- it got repetitive,

1 and I said, oh, are these just duplicative -- and just kind of  
2 phrased it a little different way, and they said, yes. And so  
3 that's in my letter.

4           We had -- and the second thing is that even the  
5 categories that they mention, Your Honor, that they include in  
6 their reply brief, all of those -- those A, B, C, F, and G,  
7 even in those, most of them actually do refer, once again, to  
8 the cite or the page. If you look at, for example, F, delivery  
9 of advertisements on the site or page. Category C, content  
10 such as advertising on the site or page. All of their  
11 references were always throughout the case, throughout the  
12 correspondence, they were always talking to us in terms of the  
13 webpages and websites that they contended infringe.

14           In fact, their letter itself, the -- the letter that  
15 they sent on -- on April 3rd, the detailed letter, specifically  
16 says in the -- on the first page, it says, the accused websites  
17 are accused to infringe. And then goes on. They -- the  
18 message -- the only thing we can take from their contentions  
19 and from all of the correspondence throughout this, even after  
20 the meet and confer on April 24th, was that they were accusing  
21 websites of infringing. And that's what they were seeking  
22 discovery on. At no point did they raise the issue of native  
23 mobile apps.

24           Under this Court's laws, we've already talked about in  
25 the earlier argument, Your Honor -- first of all, there's

1 really no dispute that the native apps were known to  
2 Personal Audio. There's no secret that you can go to iTunes  
3 and look for NBC, CBS, and FOX and find the existence of these  
4 apps.

5 Now, I guess Plaintiff's argument is that, yeah, we  
6 maybe knew about them, but we didn't know whether or not they  
7 infringe, so you are supposed to, I guess, you know, read our  
8 mind and know that we were also wondering if those might  
9 infringe. But they certainly didn't do anything to put us on  
10 notice of that.

11 So under the law, they were responsible for putting  
12 those in their infringement contentions or certainly at least  
13 doing something -- if they felt like they didn't have enough  
14 information, certainly doing something to put us on notice of  
15 that publicly accessible accused infringing product before the  
16 very end of fact discovery in the case.

17 And if we get into the whole issue of reasonable  
18 similarity a little bit, they can't possibly meet the  
19 reasonable similarity test even just based on what they've  
20 admitted, Your Honor. It's clear that the products -- the --  
21 the native mobile applications, everyone admits, I think they  
22 don't dispute, are written in a different computer language,  
23 function differently, do not use the same kind of compilation  
24 file at all. They don't even have the same type of -- of  
25 language as any of the other accused products. They just

1 simply do not function the same.

2           The most that they've been able to say is essentially  
3 there are some servers which may be somewhat similar types of  
4 servers that play some limited role in this process. That's  
5 the most they've been able to say. And, in fact, in their  
6 reply brief, they point to testimony of some of the NBC and  
7 CBS and FOX witnesses, and I don't want to get too far into the  
8 technicalities because I don't think we need to do that here,  
9 but the discussion that they have about how the native mobile  
10 applications interact with servers at the platform, which is  
11 a -- a con -- a contractor, someone who does -- who operates  
12 video content management systems, that conversation relates to  
13 servers that are not even the servers that are involved in the  
14 infringement chart that they provided for the video on the  
15 websites. That's a totally different set of servers, so to  
16 speak, than what is listed in the -- what is identified in the  
17 infringement contentions that serves the compilation files that  
18 are identified in the infringement contentions.

19           So really -- I mean, they're similar only in the sense  
20 that there might be servers involved in both. And that  
21 certainly is not sufficient to meet the reasonably similar  
22 standard under this Court's precedent.

23           THE COURT: Give me your response on the advertising.

24           MS. DAVIS: Oh, certainly, Your Honor. On the -- on  
25 the advertising, I thought -- as I indicated in our opposition



1 brief -- well, let me step back for a moment. This is another  
2 issue where from our perspective, it was not clearly raised in  
3 what they had asked for.

4           What they had asked for and -- and indicated to us  
5 that they were looking for was customer -- customer relations  
6 promotion advertising, like they were looking for things where  
7 we put on a commercial or something like that that said you can  
8 download episodes at FOX.com. And that's what they had asked  
9 for, and we had had conversations around that.

10           Subsequent to that, during the depositions, it became  
11 clear that they were looking for something different which was  
12 they were looking for documents that showed how the networks  
13 approached potential advertisers or advertising agencies to  
14 promote the idea of advertising on the videos on websites.

15           In response to that, we agreed to investigate. They  
16 made that request during the deposition process. We agreed to  
17 investigate. And as I told -- I indicated in my opposition  
18 brief and I told counsel in our meet and confer, what we have  
19 been -- what we have been able to -- what we have gotten and  
20 gathered and are willing to produce are the -- sort of template  
21 or what they have is they have slide decks that they use for  
22 this and they have been able to collect that provide the  
23 information I believe that Plaintiffs want. And I think we  
24 agreed, and Plaintiffs can tell me if I'm wrong, but  
25 Mr. Chaudhari was on the call where we talked about it, that

1 they were fine with getting these sort of template or the  
2 generalized slide decks, rather than demanding that we go back  
3 and pull every version that might have been used over that  
4 couple of year period because these are things where like, you  
5 know, if they're making a presentation on Tuesday, they would  
6 put in a new coverage page, et cetera.

7 THE COURT: Have you produced those?

8 MS. DAVIS: I haven't produced them. As I told them  
9 yesterday, they're ready to go. I mean, I can produce them in  
10 a day.

11 The issue -- the issue that they were going to  
12 identify for us whether there were other identifiable types of  
13 documents that they were looking for, and -- and essentially we  
14 talked about it. I thought we had more or less reached an  
15 agreement or thought that we -- that when they got the slide  
16 decks, that we could probably -- if there's anything else  
17 specific that they wanted, that we could work out a -- a scope  
18 of production on that.

19 So I don't think we have an ongoing dispute, but --  
20 but I can let -- Plaintiff can -- can clarify their position on  
21 that if they want to.

22 THE COURT: What are you waiting for to make that  
23 production?

24 MS. DAVIS: I was just waiting to understand from them  
25 is -- is that what they want. We talked about it yesterday

1 afternoon, so it just hasn't -- it's literally like, you know,  
2 pushing -- you know, putting it through the Bates numbering  
3 process and -- and pushing a button.

4 THE COURT: All right.

5 MS. DAVIS: They're good to go.

6 THE COURT: Thank you.

7 Mr. Pitcock, do you want to respond?

8 MR. PITCOCK: I just wanted to point out, Your Honor,  
9 that I think it's pretty clear that we were looking for  
10 information about the use of the Internet to disseminate video  
11 media, whether it was in a native mobile app or otherwise. In  
12 the 30(b)(6) topics that we served on April 2nd, long before  
13 the meet and confer, we also asked for broad categories of  
14 discovery. And they're -- they're relevant not only to the  
15 issue of do these native apps infringe, which we could not --  
16 she's -- she's pointing to nothing that would allow us to have  
17 used public information to accuse them of infringement at the  
18 time we filed our infringement contentions, is, you know, they  
19 are potential non-infringing substitutes if, in fact, they  
20 don't infringe.

21 These native apps are written specifically in part for  
22 Apple, and so one of their potential defenses is, you know, we  
23 are, you know, precluded from getting any damages against  
24 licensed Apple devices. And so all this information -- I  
25 believe it was very clear that we were seeking information rog

1 in our 30(b)(6) requests and in our conversations --

2 THE COURT: When's the first time you believe that you  
3 used the term or some similar term, the native mobile apps, in  
4 connection with your requests for discovery and disclosure?

5 MR. PITCOCK: I mean, I know they objected -- I -- I  
6 can't remember, Your Honor, and I'll be happy to supplement the  
7 record and -- and find this out. There's been a great deal of  
8 correspondence between the parties.

9 THE COURT: Was it in connection with the 30(b)(6)  
10 deposition?

11 MR. PITCOCK: Well, I believe they objected and said  
12 that they weren't going to produce anybody on native mobile  
13 apps even though they didn't move for protective order. So my  
14 understanding is they waived that objection.

15 So at least by that time, before we took the technical  
16 30(b)(6) depositions, they were aware that we wanted that  
17 specific information enough to object to producing a witness on  
18 those grounds.

19 I think it's pretty clear that it would fall, you  
20 know, under some of the categories that were -- we did not use  
21 the exact phrase "native applications," but, you know, we asked  
22 for Topic 17, the design and operation and method of use of all  
23 communication interfaces connected to the Internet for  
24 receiving requests received from remotely located client  
25 devices and for responding to such requests.

1           Again, you know, we did not -- we cannot know, absent  
2           discovery, whether these applications infringe the compilation  
3           file limitation in the patent-in-suit.

4           THE COURT: Well, did you know you were looking at  
5           that issue? Was that something that was in your mind back  
6           before they first objected to it?

7           MR. PITCOCK: Yes. I mean, when -- when -- when they,  
8           you know, didn't give us much in the way of documentation, and  
9           there was no way -- they gave us so little, there was really no  
10          way to sort of discern, you know, what were they just not  
11          producing at all? What were they going to produce a little  
12          later? What did they need clarification on and what we wanted?  
13          I mean, it was just a handful of documents for most of these  
14          network Defendants.

15          And so when we went through there, they asked us, you  
16          know, give us a category of everything that you want. We wrote  
17          out a letter, and we -- we said, you know, we want all these  
18          broad categories of documents, including the ones in the reply  
19          brief, and this certainly would have been responsive. There  
20          were lots of specific technologies that I did not name in  
21          particular that I would have thought were responsive to those  
22          requests.

23          THE COURT: Why -- why not?

24          MR. PITCOCK: I -- I didn't -- I mean, maybe I made a  
25          mistake, and I'd be willing to admit it. I just -- I always

1 thought with infringement contentions, you were only supposed  
2 to put in the things that you had a good faith basis to believe  
3 were infringing at the time, but if you had a good faith basis  
4 for believing that a Defendant infringed a claim of a patent,  
5 that you could get discovery on other instrumentalities used to  
6 perform similar or the same functions.

7 THE COURT: I just am wondering why you wouldn't  
8 identify native mobile apps. If it's in your head and you  
9 don't know if it's in their head, why not say it?

10 MR. PITCOCK: Well, I suppose -- you know, again,  
11 we -- we were at the end of discovery. We needed to take  
12 depositions. I suppose I could have been even more detailed  
13 than the multi-page letter and all the different deficiencies,  
14 but really, at that point, it was kind of like serving document  
15 requests after the substantial compliance date. I mean, I  
16 wasn't looking to be incredibly specific because I didn't have  
17 any information with which to narrow my request. I was  
18 looking for broad discovery on relevant documentation, which I  
19 believe they should have already produced under the standing  
20 order.

21 THE COURT: All right. Talk about Ms. Davis's remarks  
22 about the advertising documents.

23 MR. PITCOCK: I was -- I was not on that call, Your  
24 Honor, so if you don't mind, I'm going to defer to  
25 Mr. Chaudhari.

1 THE COURT: Okay.

2 MR. CHAUDHARI: Just really quickly, we -- we  
3 definitely want the documents that Ms. Davis referred to, but  
4 we still think there's a whole host of other -- at least we --  
5 there may be a whole host of other documents that relate to the  
6 Defendants promoting their advertising.

7 THE COURT: And have you made known to Ms. Davis what  
8 you think those other documents would include?

9 MR. CHAUDHARI: Yeah, we -- we discussed this on -- on  
10 the meet and confer yesterday, documents that -- that tout --  
11 documents to potential advertisers that, you know, tout the --  
12 tout their functionality, tout the ability to -- to -- to  
13 advertise on their show. We -- we -- that's -- we think that  
14 information is highly relevant to -- to damages in this case.

15 THE COURT: And tell me how you would intend to use  
16 that for damages.

17 MR. CHAUDHARI: I mean, it goes to the -- it goes to  
18 commercial success of the -- of the -- of the Defendants' use  
19 of the -- of the infringing devices.

20 THE COURT: All right. Thank you.

21 MS. DAVIS: Your Honor, I just want to -- I want to  
22 clarify one thing because I think I may have misspoken a bit.

23 With -- with respect to the 30(b)(6) notice, just to  
24 be -- just to be clear, because I think I might have left a  
25 misimpression that we specifically recognized at that point

1 that -- that they were asking for native mobile apps and made  
2 an objection on that basis, and I -- I misremembered the  
3 record, and I apologize for that.

4 The -- even in the 30(b)(6) notice, they  
5 specifically -- they describe accused websites, and they define  
6 accused websites by reference to the specific sites that they  
7 had indicated in their infringement contentions, and then they  
8 added language that said, and any other website that has these  
9 characteristics. And so we objected in our objections, and  
10 said -- said nothing about mobile apps, and it said nothing  
11 about mobile apps in the request which are all -- refer to the  
12 accused websites.

13 What we objected to was we objected saying, we will  
14 provide witnesses only as to those websites that you have  
15 identified in the preliminary contentions. It was only when we  
16 got into the depositions, which was after our meet and confer,  
17 that they started asking our witnesses questions about native  
18 mobile apps, and we objected saying, native mobile apps are not  
19 in the case, and that's how we -- we got here.

20 But I -- so just to be clear, even in their 30(b)(6)  
21 notice, you will not find the word "native mobile apps," and  
22 you will actually find words limiting it to accused websites  
23 and describing the accused websites that are the subject of the  
24 30(b)(6) notice. So just to be clear on that.

25 And with respect to the -- with respect to the



1 advertising documents, I mean, I think you get the sense from  
2 the conversation, I mean, we've just been asking for some way  
3 to narrow or focus what types of documents they're really  
4 looking for because telling me that they want all the documents  
5 that say good things for their case doesn't really help me find  
6 and make a request for my client.

7           So, I mean, we've talked about maybe if there were  
8 specific kinds of reports or things like that that they can  
9 identify -- that we can identify together, I mean, maybe I can  
10 provide them some additional information. But I think they  
11 have what they need now with the promotional materials that  
12 we're producing, and obviously with respect to commercial  
13 success, they have all the revenue and usage numbers that they  
14 need for that.

15           Thank you, Your Honor.

16           THE COURT: All right. Thank you, Ms. Davis.

17           We'll take a -- about a 10-minute recess now, and I'll  
18 come back. Thank you.

19           LAW CLERK: All rise.

20           (Recess.)

21           LAW CLERK: All rise.

22           THE COURT: Thank you. Please be seated.

23           With respect to the motion filed against How Stuff  
24 Works, which is Document No. 128, that motion is denied.

25           The Court finds that under the circumstances there,

1 there was not an adequate way for the Defendant to know that  
2 the Plaintiff was accusing the systems that provide the audio  
3 podcasts. And accordingly, the Court does not find that they  
4 breached their obligations regarding discovery.

5 With respect to the motion against NBC, CBS, and the  
6 FOX entities, which is Document No. 131, while the Court  
7 believes it would have been preferable for the Plaintiff to  
8 have made clear earlier in the process that it considered that  
9 the native mobile apps were at issue in the matter, the Court  
10 does believe that under the circumstances of this case and  
11 given the technology involved, the Plaintiff is entitled to  
12 narrowly tailored discovery regarding the manner in which the  
13 native mobile apps function, consisting both of technical  
14 documents and a 30(b)(6) witness on that topic.

15 I'm going to ask the parties to meet and confer on  
16 that matter and to file an agreed order on Monday. To the  
17 extent it's agreed, obviously, that's all I need. To the  
18 extent that there are disagreements, I want each side to set  
19 out what it believes the limitations and the scope of that  
20 discovery should be. And I will enter an order promptly  
21 thereafter deciding that. But it is my intent that this be as  
22 focused as possible.

23 And I'm not making any judgment about what the effect  
24 of that discovery will be on the rest of the case, but I simply  
25 want to get that accomplished promptly.

1 Does either side have any questions about the rulings  
2 that are --

3 MR. PITCOCK: No, Your Honor.

4 THE COURT: All right.

5 MR. SMITH: Not as to HSW, Your Honor.

6 THE COURT: All right.

7 MS. DAVIS: Your Honor, just one question. I assume,  
8 based on what you indicated, that we would not be getting into  
9 the issue of damages documents with respect to the mobile apps  
10 at this point, that we would just be focusing on the technical  
11 discovery to determine whether it's going to be an accused  
12 product?

13 THE COURT: That's what I'm focused on at this time.

14 MR. PITCOCK: And, Your Honor, I guess just a  
15 follow-up on the requested discovery on advertising. I just  
16 wanted to know your -- Your Honor's ruling on that.

17 THE COURT: Well, I -- what I would like to see happen  
18 on that is to see the -- that production made, and then if --  
19 if you think there's other production you need, it sounds to me  
20 like Ms. Davis is open to conferring on that. If it's a matter  
21 you can't resolve, then you can bring it back up.

22 MR. PITCOCK: Appreciate it, Your Honor.

23 THE COURT: All right.

24 MS. DAVIS: Thank you, Your Honor.

25 THE COURT: Thank you.

1                   LAW CLERK: All rise.

2                   (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

\_\_\_\_\_  
SHELLY HOLMES  
Official Reporter  
State of Texas No.: 7804  
Expiration Date: 12/31/14

\_\_\_\_\_  
Date